

ARTICLES

Carson v. Makin, Free Exercise, and the Selective Funding of State-Run Schools

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This article argues, primarily on the basis of *Carson v. Makin* and its precedents, that the selective government funding of only state-run schools is a violation of the First Amendment's prohibition on any government action that inhibits the free exercise of religion. First, contra Justice Roberts, the First Circuit was right to characterize Maine's tuition-benefit program as providing funding for "the rough equivalent" of a public school education." Yet Roberts's core legal argument is actually independent of his arguments on this point, and thus *Carson's* holding still stands even if one accepts the First Circuit's characterization of the program. By applying *Carson's* logic to the issue of selective government funding of state-run schools, this article shows that such selective funding is unconstitutional for the same reasons as Maine's program. Further, additional precedents show that the selective funding of only state-run schools cannot be defended even under the rational basis test. Finally, while Justice Breyer is right to suggest in his dissent that *Carson* imperils the constitutionality of selective funding of state-run schools, he is wrong to worry that ending this selective funding will lead to religious strife. In fact, the contrary is likely to be true.

In *Carson v. Makin*, the United States Supreme Court held that Maine's limitation of its school tuition-assistance program to nonreligious schools was a violation of the constitutional right to free exercise of religion.¹ Here are the details of the case:² The Maine constitution requires that every school-age child in the state be provided with a free public education. Through the tuition-assistance program at issue in the case, Maine fulfills this constitutional obligation for those who live in remote districts without a public secondary school. Under the program, parents in such districts can choose an approved private school for their children, and the district will pay the tuition up to a certain maximum amount. Since 1981, Maine has required that schools receiving tuition assistance under the program be nonreligious. Two families living in districts without a public secondary school who wanted to use the tuition-assistance program to send their children to a religious school brought a lawsuit challenging the constitutionality of the program's

¹ *Carson v. Makin*, 596 U.S. 767 (2022).

² *Id.* at 771–76.

requirement that participating schools be nonreligious. They argued that this requirement violated the Free Exercise Clause and Establishment Clause of the First Amendment, and also the Equal Protection Clause of the Fourteenth Amendment. The Court ruled that Maine's exclusion of religious schools from the tuition-assistance program did indeed violate the Free Exercise Clause, relying primarily on *Trinity Lutheran v. Comer* and *Espinoza v. Montana* as precedents.³

In his dissent, Justice Breyer argues that the logic of the Supreme Court's decision in *Carson* imperils the constitutionality of state schools' monopoly on public educational funding. As Breyer puts it, by contrast with previous decisions *permitting* states to use funds to pay for religious education in the context of school choice programs, *Carson* holds that "a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education."⁴ He then poses a series of rhetorical questions that point to the logical implications of this holding: "What happens once 'may' becomes 'must'? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education?"⁵

Despite Justice Roberts's attempt to craft the majority opinion to avoid these implications, I believe that Justice Breyer is right on this point, and that the answer to both of his rhetorical questions is yes. The logic of *Carson*, and of the prior cases on which *Carson* relies, points to the conclusion that the public school system in its current form is a violation of the First Amendment's prohibition on any government action that inhibits the free exercise of religion. The majority opinion tries to avoid this implication by characterizing Maine's program as a school choice program akin to the Montana scholarship program at issue in *Espinoza*, which *Carson* relied on as a precedent. However, unlike the Montana scholarship program, Maine's program exists to ensure that children have access to education in areas where there is no public school. As Justice Breyer put it, the point of the program is "to ensure the provision of free statewide public school education."⁶ And while *Espinoza* claims that "a state need not subsidize private education," once it is acknowledged both that the state's interest in public education can be satisfied through private provision of education, and that it does not violate the Establishment Clause for states to pay for

³ *Id.* at 780, 789; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana*, 591 U.S. 464 (2020).

⁴ *Carson*, 596 U.S. at 795 (Breyer, J., dissenting) (emphasis original).

⁵ *Id.*

⁶ *Id.*

religious education via school choice programs, it is not clear what could justify limiting government educational funding to government-run schools, given that doing so substantially burdens religious parents who can only obtain a religious education for their children by forgoing the benefit of free public education.⁷

This is, of course, precisely the conclusion that Roberts (writing for the majority) tries to avoid, by challenging the First Circuit’s characterization of the program as providing funding for “‘the rough equivalent’ of a public school education.”⁸ The first step, then, in showing why Breyer is right about *Carson*’s implications is to show why Roberts’s argument on this point is unsuccessful. This is what I do in the first section of this article. In the second section, I argue that Roberts’s rejection of the First Circuit’s characterization of the program is unnecessary for the holding—in other words, the core legal argument is successful even if one accepts the First Circuit’s characterization of the program. The third section applies *Carson*’s logic to the issue of selective government funding of state-run schools, showing that such selective funding is unconstitutional for the same reasons as the Maine tuition-benefit program. The fourth section strengthens the argument, drawing on additional precedents and arguments to show that the selective funding of only state-run schools cannot be defended even under the rational basis test. Finally, the concluding section argues that Justice Breyer’s argument in his dissent is only *partially* right: he is right about *Carson*’s logical implications, but wrong in worrying that ending the selective funding of state-run schools will lead to religious strife. In fact, the contrary is likely to be true.

The First Circuit Was Right: Maine’s Program Seeks to Provide the “Rough Equivalent” of Public School Education

Roberts makes several points in his attempt to challenge the First Circuit’s characterization of Maine’s tuition-benefit program as seeking to provide the “rough equivalent” of a public school education. He argues, first, that nothing in the statute establishing the tuition-assistance benefit suggests that “the ‘private school’” selected by the parent “must somehow provide a ‘public’ education” in order to qualify.⁹ Roberts then goes on to enumerate various differences between Maine’s public schools and the private schools that are eligible for tuition assistance under the program. According to Roberts, the main differences are: (1) unlike most public schools, private schools do not have to accept all students; (2) many of the private schools

⁷ *Espinoza*, 591 U.S. at 487.

⁸ *Carson*, 596 U.S. at 782 (citing *Carson v. Makin*, 979 F.3d 21, 44).

⁹ *Carson*, 596 U.S. at 782–83.

eligible for the program charge tuition in excess of the maximum benefit, and are therefore not free; (3) there is no requirement that the private school curriculum “even resemble that taught in the Maine public schools.”¹⁰

How real or significant are these differences? Let’s consider them one by one. With regard to the first supposed difference, most public schools do not really accept all students. Rather, they typically accept all (and only) students who live within the school district. Yet school districts are often de facto segregated by race or socioeconomic class. It is no secret that the best public schools tend to be in the most affluent, primarily white neighborhoods, in part because high property values provide a higher tax base that allows for greater educational funding than in poorer districts.¹¹ Indeed, this issue was the source of a class-action lawsuit that was decided by the Supreme Court in *San Antonio Independent School District v. Rodriguez*.¹² It is common knowledge that many parents seek to live in certain areas (or avoid living in other areas) precisely so that their children can attend high-quality public schools. Thus, at least when it comes to high-quality public schools, the truth of the matter is that they are hardly open to all. Rather, they are open only to the relatively few children whose parents are wealthy enough to afford a home in a good school district.

Roberts’s second point is that many of the private schools eligible for Maine’s program charge tuition in excess of the maximum available benefit and are therefore not free. Yet my response to the previous argument applies to this point as well. For the most part, only those who are relatively wealthy can afford to send their children to good public schools, because low-income families cannot usually afford to live in a good school district. And it is no accident that good public schools tend to be in affluent neighborhoods. Public schools receive funding not only from the state but also from local governments. And local governments have more money to spend on public schools when high home values yield high property-tax revenues. Thus, many public schools are not really “free” given that the indirect price to be eligible to attend often includes the high price of a home in an affluent neighborhood, which is beyond the reach of many families.

What about Roberts’s third point, “that the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools”?¹³ While it is true that private schools do not have to meet the same curricular requirements as the public schools, most states (including Maine) operate public magnet schools, with highly specialized

¹⁰ *Id.*

¹¹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹² *Id.*

¹³ *Carson*, 596 U.S. at 783.

curricula quite different from traditional public schools. (And these magnet schools also usually have certain admissions standards that traditional public schools do not have.) Further, and most importantly, the curriculum at eligible private schools *is* similar to the curriculum of the public schools in the most relevant sense: it is deemed satisfactory for the fulfillment of the state's compulsory education requirement and thus deemed sufficient to meet the state's educational interests. This is why the legislature deemed the tuition-benefit program sufficient to fulfill the state's constitutional obligation to provide a free public education to all children. Indeed, if the eligible private schools were not the "rough equivalent" of public schools in this sense, then Maine's program would be failing to fulfill its purpose.

***Carson's* Holding Stands Even If the First Circuit's Characterization of Maine's Program Is Correct**

Given these flaws in Roberts's argument, it seems that the First Circuit was correct to characterize Maine's program as seeking to offer students the "rough equivalent" of a public school education. Nonetheless, *Carson* and its precedents indicate that the First Circuit was wrong in concluding that it is constitutionally permissible for Maine to require that education to be secular. In other words, Roberts's argument against the First Circuit's characterization of the program is irrelevant to the holding in *Carson*. One can therefore accept the holding, and the logic underlying it, while rejecting Roberts's denial of the rough equivalence of private and public schools.

The First Circuit argued that since it is permissible for Maine to require that public school education be secular, it should also be permissible for Maine to require that the "rough equivalent" of public school education be secular.¹⁴ Yet this argument is fundamentally flawed. The reason why it is permissible for the state to require that its own schools be secular is that it would run afoul of the Establishment Clause for the state itself to run religious schools. If the state were to run religious schools, this would inevitably involve state favoritism of some religions over others. And as Gerard Bradley convincingly argues, the "favoring of one religion over another" is precisely what the Establishment Clause has always consistently and uncontroversially been understood to prohibit.¹⁵ However, the Establishment Clause is not violated when the state provides funding that enables *parents* to choose privately operated religious schools for their children, as the Court made clear

¹⁴ *Id.* at 777, quoting *Carson v. Makin*, 979 F.3d at 44.

¹⁵ Gerard V. Bradley, *The Death and Resurrection of Establishment Doctrine*, 61 DUQ. L. REV. 1, 34 (2023) (arguing that despite the many twists and turns in the Court's Establishment Clause jurisprudence, "[t]he Court has always and without exception stated that the Clause itself prohibits a certain government preference for one religion over another.")

in *Zelman*.¹⁶ When “public education” is being provided by nonstate actors, therefore, the Establishment Clause does not provide a reason for requiring that education to be secular.

While it might be argued that the state has a legitimate interest in seeking greater separation of church and state than the Establishment Clause requires, as *Carson* indicates, the “state interest ... in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause.”¹⁷ And under the precedents cited by *Carson*, the Maine program (even as interpreted by the First Circuit) clearly does pose a significant burden on the free exercise of religion. According to *Carson*, “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.”¹⁸ As an example of this principle, the *Carson* court cites *Sherbert v. Verner* (in which a Seventh-day Adventist lost her job for refusing to work on the sabbath, and was denied unemployment benefits), noting that “[a] State may not withhold unemployment benefits ... on the ground that an individual lost his job for refusing to abandon the dictates of his faith.”¹⁹

One might object that religious parents in Maine are not being denied the benefit of a free education for their children since they have the same right as nonreligious parents to send their children to a public school or to a private secular school that is eligible for the tuition benefit. But this objection misses the point because many religious parents believe that sending their child to a secular school (public or private) would be a failure to fulfill their religious obligation to educate their children in the faith. In other words, many religious parents are in a position similar to that of the woman who was denied unemployment benefits in *Sherbert* because she lost her job due to her refusal to violate her religious obligation to abstain from work on the sabbath.²⁰ The situation of religious parents with regard to the benefit of free education is also similar to the situation of the Trinity Lutheran Church Child Learning Center, which “remained free to continue operating as a church,” but “only at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center [was] otherwise fully qualified.”²¹ Similarly, religious parents are free to provide their children with an education in accord with their faith only at the cost of being excluded from the benefit of free education. Finally, the situation of religious parents in Maine is almost the same as that of the plaintiffs in *Espinoza*, who, as a

¹⁶ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁷ *Carson*, 596 U.S. at 781 (ellipses in original; quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); internal quotation marks omitted)

¹⁸ *Id.* at 778 (relying on *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) and *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947))

¹⁹ *Id.* (citing *Sherbert*, 374 U.S. at 399–402)

²⁰ *Id.*

²¹ *Id.* (quoting *Trinity Lutheran*, 582 U.S. ___, 137 S. Ct. 2012, 198 L. Ed. 2d 551, 561 (2017); internal quotation marks omitted)

result of the Montana Supreme Court decision that shut down a scholarship program in order to avoid allowing some of those scholarships to be used at religious schools, were denied access to “scholarship funds they otherwise would have used to fund their children’s educations at religious schools.” Further, just as in *Espinoza*, the Maine program “bar[red] religious schools from public benefits solely because of the religious character of the schools.”²²

What this analysis shows is that Roberts’s disagreement with the First Circuit’s characterization of the Maine program as seeking to provide the “rough equivalent” of a public education actually makes no difference to the holding, as the logic of the *Carson* opinion applies just as well (or perhaps even more strongly) if you agree with the First Circuit on this point. For if private religious schools, like private secular schools, *do* provide the “rough equivalent” of a public education *except* for their religious character, then religious schools—and religious parents who believe their faith obliges them to send their child to a religious school—are being denied a public benefit because they are religious. And while respect for the Establishment Clause justifies the state in offering only secular education in the schools that it operates, respect for the Free Exercise Clause requires that the state *not* deny the tuition-assistance benefit to privately run religious schools (or to parents who choose to send their children to such schools).

Why *Carson* Implies That Selectively Funding Only State-Run Schools Is Unconstitutional

If it violates the Free Exercise Clause for Maine to deny the tuition-assistance benefit to religious schools and parents, the same logic would seem to indicate that it violates the Free Exercise Clause for *any* state to deny the benefit of educational funding to religious parents who believe they have a religious obligation to send their children to religious schools. In other words, the same logic paves the way for recognizing that the selective funding of *only* state-run schools is unconstitutional, and thus that some form of school-choice program is constitutionally required. For, given that state-run schools must be secular, the selective funding of *only* state-run schools effectively denies many religious parents a significant benefit because of their religious beliefs, just as the Maine program did. This is the case because many religious parents must choose *either* to forgo this significant benefit *or* to forgo the ability to exercise their religion by providing their children with an education that aligns with their faith. And forcing people to choose between their faith and the receipt of a significant public benefit is an unconstitutional condition on the free exercise of religion. As the *Carson* court makes clear, “[a] State’s antiestablishment interest does not justify

22. *Id.* at 779 (quoting *Espinoza*, 591 U.S. ___, 140 S. Ct. 2246, 207 L. Ed. 2d 679, 690; internal quotation marks omitted).

enactments that exclude some members of the community from an otherwise available public benefit because of their religious exercise.”²³ But this is exactly what happens when states selectively fund only state-run schools.

Some might argue that, unlike the state actions at issue in *Espinoza* and *Carson*, the selective funding of only state-run schools (“selective school funding”) does not bar schools from benefits *solely* because of their religious character, because private secular schools are also barred from receiving benefits. Thus, the laws at issue would be neutral and generally applicable, and (under *Employment Division v. Smith*) would not require strict scrutiny even though they burden free exercise. That is only true, however, when considering the impact of the laws on *schools*. The situation is different when considering the impact of selective school-funding laws on *parents*, who (along with their children) are the primary beneficiaries of the programs at issue in *Espinoza* and *Carson*. As argued above, such laws do bar some religious parents from receiving the benefit of a free education for their children solely because of their religious beliefs obligating them to provide their children with a religious education. Strict scrutiny is therefore required in this case for the same reason as in *Espinoza* and *Carson*. Further, even if one disagrees with this argument, strict scrutiny would still be required under *Smith*, because free-exercise rights *and* parental rights are at stake, making this a “hybrid” case akin to *Wisconsin v. Yoder*.²⁴

Selective funding of *only* state-run schools would clearly not survive strict scrutiny. *Pierce v. Society of Sisters* already explicitly acknowledged that the state’s interest in educating future citizens can be met through private provision of education.²⁵ Thus, even if one agrees with Roberts about the differences between public and private education, the state nonetheless lacks a compelling interest in setting itself up as the “default” education provider by making the benefit of free education conditional on sending one’s child to a state-run school. Alternatively, if one defines the state interest more broadly as ensuring that all children have access to education that will prepare them for future citizenship, one can grant that the state has a compelling interest, but the state would then fail the least-restrictive-means test, given that this interest could be met by providing parents with educational funds that can be used at the school of their choice.

One might also argue—as the Montana Department of Education did in *Espinoza*—that there is a compelling government interest in “safeguard[ing] the public school system by ensuring that government support is not diverted

²³ *Id.* at 781.

²⁴ *Employment Division v. Smith*, 494 U.S. 872, 881–82 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940); then citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and then citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

²⁵ *Pierce*, 268 U.S. at 510.

to private schools.”²⁶ Yet many states offer some form of school-choice program in which public funds are diverted to privately operated schools, and there is no evidence that such programs undermine the public school system. On the contrary, evidence indicates that such programs tend to lead to improvements in the quality of the public schools by introducing competition and accountability,²⁷ and also save taxpayers a considerable amount of money,²⁸ while improving overall student outcomes.²⁹ More fundamentally, the state interest in safeguarding the public school system is merely instrumental to the state interest in ensuring that all children have access to a satisfactory education. If the public schools are providing children with a satisfactory education, they will not require a monopoly on public educational funding in order to survive. And if the public schools are not providing a satisfactory education, then they are failing to fulfill their purpose, and there is no legitimate reason for the state to seek to maintain them, rather than to support privately operated schools that better fulfill the state’s educational goals.

There Is No Legitimate Interest in Selective Funding of State Schools

Following this line of argument, a case can be made that the selective funding of only state-run schools would not even survive rational-basis scrutiny, because the state lacks a legitimate interest in funding *only* its own schools. After *Pierce*, all states recognize that private schools (religious or secular) offer the “rough equivalent” of a public education in the crucial sense that such schools fulfill the compulsory education requirement. What grounds, then, does the state have for effectively limiting the benefit of educational funding only to parents who choose to send their children to state-run schools? To put the matter slightly differently, what grounds does the state have for coercing parents to send their children to state-run schools? The word *coercion* might sound too strong here, but it is not: education is compulsory, and for many parents the free state-run schools are the only affordable option. Even for parents wealthy enough to be able to pay for private school tuition,

²⁶ *Espinoza*, 591 U.S. at 486.

²⁷ Cassandra M. D. Hart & David Figlio, *Does Competition Improve Public Schools? New Evidence from the Florida Tax-Credit Scholarship Program*, 11 EDUC. NEXT (Winter 2011), at 74, <https://www.educationnext.org/does-competition-improve-public-schools/>; Caroline M. Hoxby, *Rising Tide: New Evidence on Competition and the Public Schools*, 1 EDUC. NEXT (Winter 2001), at 68, <https://www.educationnext.org/rising-tide/>; Clive R. Belfield & Henry M. Levin, *The Effects of Competition Between Schools on Educational Outcomes: A Review for the United States*, 72 REV. EDUC. RSCH. 279 (2002).

²⁸ Martin Lueken & Cooper Conway, *The Fiscal Effects of School Choice*, ENGAGE BY EDCHOICE (Oct. 15, 2024), <https://www.edchoice.org/engage/the-fiscal-effects-of-school-choice/> (“From their inception through FY 2022, the 48 school choice programs studied generated cumulative net fiscal benefits for state and local taxpayers combined ranging from an estimated \$19.4 billion to \$45.6 billion. Since all programs analyzed had been operating for over five years by FY 2022, the fiscal benefits are likely closer to the high-end estimate of \$45.6 billion.” These savings occurred in large part because “[p]ublic schools cost an average of over \$17,000 per student annually, while the average cost to taxpayers for students in school choice programs is approximately \$6,000.”)

²⁹ *Id.* (“Policymakers should note that these fiscal effects ignore any indirect economic benefits that choice offers, such as lowering crime rates and improving longer term outcomes by reducing high school dropout rates and boosting post-secondary outcomes.”) *See also* note 32, *infra*.

the financial penalty for doing so is extremely high (one religious father of five calculates that the family lost \$845,000 in educational funding by not sending the children to public school³⁰), and as *Trinity Lutheran* recognizes, even mild economic pressure places an unconstitutional condition on the free exercise of religion.³¹

Once we recognize that privately operated schools can be the “rough equivalent” of public schools, insofar as they fulfill the state’s interest in educating future citizens just as well as (and in many cases better than) state-operated schools, there is no legitimate state interest that justifies selectively funding *only* state-run schools.³² The state’s interest in ensuring that *all* children have access to education can justify funding *some* state-run schools, but this interest cannot justify funding *only* state-run schools. The only reason that the state could have for selectively funding *only* state-run schools is that it wants to privilege the state’s preferred educational messages, values, and methods over alternative educational messages, values, and methods. For, as Justice Barrett noted during the oral argument in *Carson*, all curricular choices presuppose value judgments—there is no such thing as a value-neutral education.³³ But the state’s interest in privileging its own educational messages, values, and methods is not a legitimate one. On the contrary, for the state to use its coercive power to compel parents (directly or through financial pressure) to expose their children to the state’s preferred values is unconstitutional. As Philip Hamburger persuasively argues, education is speech, and the state-run schools’ monopoly on public educational funding is an unconstitutional condition on parents’ educational speech insofar as it “presses parents to give up their educational speech and substitute the state’s.”³⁴ The state’s interest in privileging its own educational message through selective funding of only state-run schools is therefore illegitimate and would not even survive rational-basis scrutiny.

30 Richard Duncan, *Why School Choice is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RES. L. REV. 1055, 1058 (2023).

31 *Trinity Lutheran*, 582 U.S. at 463.

32 See, e.g., Thomas Stewart & Patrick J. Wolf, *The School Choice Journey: Parents Experiencing More than Improved Test Scores*, AM. ENTER. INST. (Jan. 2015), <https://www.aei.org/wp-content/uploads/2015/01/The-school-choice-journey.pdf>; Patrick J. Wolf, *School Voucher Programs: What the Research Says about Parental School Choice*, 2008 BYU L. REV. 415, 416 (2008) (“The high-quality studies on school voucher programs generally reach positive conclusions about vouchers. The many evaluations of targeted school voucher initiatives confirm that these programs serve highly disadvantaged populations of students. Of the ten separate analyses of data from ‘gold standard’ experimental studies of voucher programs, nine conclude that some or all of the participants benefited academically from using a voucher to attend a private school.”); Patrick J. Wolf, *Civics Exam: Schools of Choice Boost Civic Values*, 7 EDUC. NEXT (May 11, 2007), <https://www.educationnext.org/civics-exam/> (“[T]he 59 findings from existing studies suggest that the effect of private schooling or school choice on civic values is most often neutral or positive. Among the group of more-rigorous studies, 12 findings indicate statistically significant positive effects of school choice or private schooling on civic values and 10 suggest neutral results. Only one finding from the rigorous evaluations indicates that traditional public schooling arrangements enhance a civic value.”) (internal references omitted); David E. Campbell, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, 2008 BYU L. REV. 487, 510 (2008) (“A survey of students currently enrolled in private schools demonstrates that when compared to public school students, they are more likely to engage in community service, develop civic skills in school, express confidence in being able to use those skills, exhibit greater political knowledge, and express a greater degree of political tolerance. Based on these findings, it would appear that when compared to their publicly educated peers, students in private schools generally perform better on multiple indicators of their civic education.”)

33 Nick Reaves, *Religious Autonomy in Carson v. Makin*, 2022 HARV. J.L. & PUB. POL’Y PER CURIAM 1, 5.

34 Philip Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 432 (2024).

Further, this privileging of the state's educational message also arguably violates the Establishment Clause. For when the state privileges its own educational message, it also privileges a secular worldview, and such a worldview is likely to be much more acceptable to the adherents of theologically liberal religious denominations than to those who are more theologically conservative. Further, there is substantial evidence that the values taught in public school curricula tend to align with theologically liberal viewpoints on contested topics, such as issues related to marriage, sexuality, and gender.³⁵ As Hamburger notes, "theological liberals in government, accreditation organizations, professional groups, and foundations have worked to have public schools homogenize pupils along theologically liberal lines—that is, against any dogma or orthodoxy. Traditionally, this attitude to dogmas or orthodoxies meant inculcating anti-Catholic views. Increasingly, it also means inducing students to question ideas of truth, merit, morals, sex differences, and so forth."³⁶ Likewise, Helen Alvare points out that "[t]he leading interest group representing the positions of public-school teachers and administrators [the National Education Association] openly aligns itself with groups recommending instructing children to affirm viewpoints controverting and negatively characterizing Christian positions."³⁷ Thus, privileging the state's preferred educational message involves state favoritism of theologically liberal views over theologically conservative ones, and this sort of religious favoritism is exactly what the Establishment Clause has always been understood to prohibit.³⁸ Far from being legitimate, therefore, this privileging of the state's educational message violates the Establishment Clause, in addition to violating freedom of speech and posing a serious burden on the free exercise of religion.

Conclusion: What Breyer Got Wrong

While the foregoing arguments show why Breyer was right to claim that the logic of *Carson* imperils the constitutionality of state-run schools' monopoly on public educational funding, they also begin to indicate why Breyer is wrong to fear that these implications of the ruling will fuel religious strife and thus undermine what he takes to be the primary purpose of the religion clauses.³⁹ Indeed, the very arguments that Breyer makes in criticizing *Carson* and its implications would actually support universal school-choice programs that end the selective funding of only state-run schools. Breyer writes,

³⁵ Helen Alvare, *Families, Schools and Religious Freedom*, 54 Loy. U. Chi. L.J. 579, 600ss (2022) (citing numerous examples of public schools teaching views about marriage, sexuality, and gender that are directly contrary to core Catholic teachings).

³⁶ Hamburger, at 459.

³⁷ Alvare, at 632.

³⁸ Bradley, at 34.

³⁹ *Carson*, 596 U.S. 791 (Breyer, J., dissenting) (The religion clauses "were written to help create an American Nation free of the religious conflict that had long plagued European nations.")

People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, and social division. The Religion Clauses were written in part to help avoid that disunion. As Thomas Jefferson, one of the leading drafters and proponents of those Clauses, wrote, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”⁴⁰

What Breyer fails to notice, however, is that the selective funding of state-run schools actually does precisely what Jefferson believes to be “sinful and tyrannical.” As Hamburger points out, “public schools invite capture and social conflict and impose the views of some on the children of others.”⁴¹ No curriculum is value-neutral, and, as already noted, many public schools are promoting highly controversial viewpoints that align with those of theologically liberal or progressive denominations, while explicitly criticizing theologically conservative teachings. Yet all citizens are compelled to contribute their tax money to propagate these controversial opinions—which many believe to be false and pernicious—to a captive audience of impressionable children. By contrast, were some form of universal school-choice system adopted in all states, no one viewpoint would be privileged, and educational funds would be distributed in accord with parents’ choices about which values they want their children to be taught.

Indeed, it is the current system—in which all are forced to contribute financially to imposing the controversial views of progressive elites on children, and in which many parents are coerced to send their children to public schools that teach values directly contrary to their religious beliefs—that fosters religiously based strife, leading to protests from angry parents, contentious disputes over public school curricula, and legal battles between religious parents and schools.⁴² If the selective funding of only state-run schools were ended, and parents could use state educational funding to send their children to schools that align with their values, all of this strife would be eradicated at its source. As empirical work on the sources of religious conflict has shown, such conflict tends to arise when religious believers feel threatened due to restrictions on free exercise.⁴³ Given that, as

⁴⁰ *Id.* at 793 (quoting *Everson*, 33 U.S. 1 at 13).

⁴¹ Hamburger, at 440.

⁴² See, e.g., *Ibanez v. Albemarle Cnty. Sch. Bd.*, 2024 Va. App. LEXIS 90; *Mahmoud v. McKnight*, 2023 D. Md.; Evan Goodenow, *Loudoun Schools Curriculum Attacked, Defended at Protests before Board Meeting*, LOUDOUN TIMES-MIRROR (Sept. 14, 2022), https://www.loudountimes.com/news/education/loudoun-schools-curriculum-attacked-defended-at-protests-before-board-meeting/article_b612b086-345a-11ed-ba89-ef87bd168506.html. See also John Boersma, *Neutrality and School Choice: Two Cheers for Carson v. Makin*, J. RELIGION, CULTURE & DEMOCRACY, Sept. 2023, <https://doi.org/10.54669/001c.87445> (“If the basic value of the Religion Clauses is the avoidance of religious strife, as Justice Breyer claims, Maine’s exclusion of religious groups seems to have undermined rather than furthered this basic value.”)

⁴³ BRIAN GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE 21ST CENTURY* (New York, Cambridge University Press, 2011).

Breyer emphasizes, “there is almost no area as central to religious belief as the shaping, through primary education, of the next generation’s minds and hearts,” it is no surprise that a system that severely restricts parents’ ability to fulfill their religious educational obligations should lead to significant strife.⁴⁴ If Breyer really is concerned to prevent religious strife, therefore, he should welcome *Carson*’s implications. Few measures would do more to alleviate current religious conflicts than eliminating the substantial burden on free exercise that results from the selective funding of only state-run schools.

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⁴⁴ *Carson*, 596 U.S. 805–06 (Breyer, J., dissenting) (quoting *Zelman*, 536 U.S. at 725 (internal quotation marks omitted)).